83-889

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. ____

TELINA NELSON, *a minor*, by Cindra R. Carson, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*,

v.

PARK INDUSTRIES, INC., *Defendant*,
UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendant*,
F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY, *Defendants-Respondents*,
and
BUNNAN TONG & COMPANY, LTD., *Defendant-Petitioner*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 15, 1983

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution permits the exercise of personal jurisdiction in Wisconsin over a Hong Kong exporter and buying representative for United States merchants who maintains no offices, employees or business relations in Wisconsin or any state or territory of the United States.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Bunnan Tong & Company, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 13, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The opinion of the District Court for the Western District of Wisconsin, not yet reported, appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 13, 1983. A timely petition for rehearing en banc was denied on October 28, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment of the United States Constitution permits the exercise of personal jurisdiction in Wisconsin over a Hong Kong exporter and buying representative for United States merchants who maintains no offices, employees or business relations in Wisconsin or any state or territory of the United States.

STATEMENT OF THE CASE

This matter involves a claim for damages by and on behalf of Telina Nelson for injuries allegedly suffered when a shirt purchased for her at a F.W. Woolworth store in Rice Lake, Wisconsin, came in contact with an open flame. The shirt in question was purchased by Bunnan Tong & Company, Ltd. (Bunnan Tong), at the direction of F. W. Woolworth Company (Woolworth), from United Garment Manufacturing Company, Ltd. (United), the manufacturer. Bunnan Tong selected material and made its purchase pursuant to Woolworth's specifications, took delivery of the shirt from United, and, pursuant to Woolworth's instructions, delivered the shirt to Western Navigation (Fareast), Ltd. of Kowloon, Hong Kong.

Bunnan Tong is a Hong Kong corporation, and has never had any physical presence in the state of Wisconsin, or in any other state of the United States. No representative of Bunnan Tong has ever visited the state of Wisconsin. Bunnan Tong acted as Woolworth's buying representative for purchase of the shirt in question, conferring with Woolworth representatives in Hong Kong and purchasing the shirt in question in Hong Kong for an agreed commission. Bunnan Tong did nothing to the shirt in question to prepare the shirt or its packaging for sale. Bunnan Tong took delivery of the shirt from United "FOB Hong Kong" and delivered the shirt to Woolworth's shipper in Hong Kong. Bunnan Tong's only involvement with the shirt ended at that point.

The shirt was distributed and marketed in the United States by Woolworth, pursuant to Woolworth's distribution and marketing decisions and in a market developed by Woolworth. Bunnan Tong at no time participated in or was able to exercise any control over Woolworth's market development or distribution and marketing decisions. Bunnan Tong received a copy of the summons and complaint in this matter in Hong Kong.

Jurisdiction in the District Court was based on 28 U.S.C. § 1332(a). Bunnan Tong's motion to dismiss for lack of personal jurisdiction was granted by the District Court for the Western District of Wisconsin on September 16, 1982. Appendix B. Woolworth appealed that decision,

and on September 13, 1983, the United States Court of Appeals for the Seventh Circuit reversed. Appendix A. A timely petition for rehearing *en banc* was denied on October 28, 1983. Appendix C.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

The opinion of the Seventh Circuit Court of Appeals in this case holds that even though Bunnan Tong made no effort to distribute or market the shirt in question in any state of the United States, had no part in originating Woolworth's distribution system and had no input or control concerning the maintenance and development of that system, Bunnan Tong acted to place the shirt in a stream of commerce which ultimately ended at a Wisconsin Woolworth store, and is therefore subject to personal jurisdiction in Wisconsin.

> *Bunnan and United were aware of the Woolworth distribution scheme and derived economic benefits from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that Bunnan and United were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt and allegedly caused injury. (Appendix A, p. 10.)*

In making its decision, the Seventh Circuit concluded that this Court's opinion in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), adopted a stream of commerce analysis which would find constitutionally permissible personal jurisdiction whenever a foreign citizen or corporation handles a product in a stream of commerce, whether or not it exercises any control over the distribution and sale of that product. See text and footnote at Appendix A, pp. 8–9.

In announcing its interpretation of *World-Wide Volkswagen*, the Seventh Circuit placed itself in direct conflict with the decisions of the Courts of Appeals for the Third, Fifth and Ninth Circuits. The Court of Appeals for the Third Circuit, in *DeJames v. Magnificence Carriers, Inc.*, 654 F. 2d 280 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), recognized that under the principles explained in *World-Wide Volkswagen*, a defendant manufacturing ships for transporting commerce intended for the United States was not subject to personal jurisdiction in a state where those ships could be expected to regularly dock.

The Court of Appeals for the Ninth Circuit, first in *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F. 2d 1175 (1980), *cert. denied*, 449 U.S. 1062 (1980), and then in *Insurance Company of North America v. Marina Salina Cruz*, 649 F. 2d 1266 (1981), has agreed with the Third Circuit's interpretation of *World-Wide Volkswagen*. In *Kramer*, the Ninth Circuit found that even a significant interest in promoting car sales in the United States and the approval of the marketing scheme developed by its United States subsidiary did not constitute the kind of deliberate invoking of forum protection by a foreign corporation required for personal jurisdiction by *World-Wide Volkswagen*. In *Insurance Company of North America*, the Ninth Circuit found that the extensive conversion of a fishing vessel known to be intended for service in Alaskan waters did not subject the foreign defendant to personal jurisdiction in Alaska.

Most recently, the Court of Appeals for the Fifth Circuit, in *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A.*, 703 F. 2d 143 (1983), has announced its interpretation of the *World-Wide Volkswagen* due process limitations on personal jurisdiction in direct conflict with the decision in this case. In *Talbot*, the Fifth Circuit found that the knowledge of and participation in Hinomoto's national distribution scheme by a West Coast based importer serving Hinomoto was not sufficient for personal jurisdiction in a state served by Hinomoto but not directly serviced by the importer.

In each of these cases, the Court of appeals for the Third, Fifth and Ninth Circuits have recognized the limitation of minimum contacts on the stream of commerce analysis of exercise of personal jurisdiction consistent with the due process clause of the fourteenth amendment as explained in *World-Wide Volkswagen*.The opinion of the Seventh Circuit in this case specifically rejects this limitation of the stream of commerce analysis, holding instead that Bunnan Tong, merely because it helped to place the shirt in question into the national retail market established and controlled by Woolworth, "...should reasonably anticipate being subject to suit in any forum within that market where their product caused injury." Appendix A, p. 9.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS REGARDING EFFORTS TO INVOKE PERSONAL JURISDICTION IN STATE AND FEDERAL COURTS.

This Court in its decision in *World-Wide Volkswagen Corp. v. Woodson, supra*, p. 3, gave clear and specific direction to state and federal courts considering the question of the due process limitations imposed on exercise of personal jurisdiction over nonresident defen-

dants with their principal places of business in United States jurisdictions other than the forum state. This Court has not spoken, however, concerning the application of the principles set forth in *World-Wide Volkswagen* to non-United States nationals. With world trade increasing significantly every year, and with the economy of the United States, and each individual state, ever more dependent on the continuing orderly expansion of that trade, questions concerning personal jurisdiction over non-United States corporations and individuals are ever more important. Questions involving personal jurisdiction over such non-United States corporations and individuals have become common and are continuing to increase, and both litigants and lower courts urgently need the assistance of this Court in understanding the principles to be applied in their resolution. Among the unanswered questions to be considered are:

(1) Should the principles and analysis of *World-Wide Volkswagen* apply to non-United States corporations and individuals? *Worldwide Volkswagen* considers the interstate limits on state jurisdiction imposed by the due process clause of the fourteenth amendment, with the due process clause "... acting as an instrument of interstate federalism, ..." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 294. The principle of interstate federalism is, however, inapposite to questions involving personal jurisdiction over non-United States corporations or individuals. The underlying concern for protecting the powers of co-equal sovereigns is, however, precisely relevant to the question of assertion of personal jurisdiction over foreign citizens and corporations with no physical presence or contacts within the United States. Because the Court's entire opinion in *World-Wide Volkswagen* is predicated on construing the due process clause as an instrument of federalism, litigants and lower courts are without guidance as to what, if any, currency should be given those principles when interests of other nations are involved.

(2) Should the analysis of *Worldwide Volkswagen*, or some other analysis, apply to each personal or corporate cog in an interstate or international distribution scheme for purposes of determining personal jurisdiction? The opinion of the Seventh Circuit in this case cites no less than nine cases as supporting its reading of *World-Wide Volkswagen* as creating a distinction with regard to extension of personal jurisdiction over manufacturers and primary distributors on one hand and secondary distributors and retailers on the other, but recognizes in a footnote that the cases cited involve manufacturers and distributors "...who governed their own distribution systems and/or also engaged in activities in the forum soliciting sales of their products." Appendix A, pp. 7-8.

Bunnan Tong is not such a controlling participant in the stream of commerce. Rather, Bunnan Tong is a local Hong Kong expediter, a middleman, the conduit for the passage of the shirt in question from its manufacturer to Woolworth's shipper. The Seventh Circuit agrees that Bunnan Tong is unable to exercise any control over the existence or development of Woolworth's marketing system, but finds that mere knowledge of the existence of that system is sufficient for jurisdiction. Appendix A, pp. 8–9.

The Fifth Circuit, on the other hand, finds in *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A., supra*, p. 4, that a United States based importer servicing a United States distributor, aware of the distributor's nationwide marketing scheme and supplying products at certain points in that scheme, is not subject to personal jurisdiction in a state a part of that scheme but not directly serviced by the distributor. Should Bunnan Tong or that importer—or neither of them—or both of them—be subject to personal jurisdiction?

(3) Should manufacturers, distributors and other middlemen be permitted to structure their business relationships in the United States so as to intentionally limit jurisdictionally sufficient contacts to a limited number of states? The Fifth Circuit Court of Appeals, in *Talbot*, recognizes that the importer defendant:

> *. . . deliberately structured its relationship with Hinomoto and Toyosha so as to be subject to suits only in a limited number of states; the legal system should have a "degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit." Volkswagen, supra,* at 297, 100 S. Ct. at 567. *Talbot Tractor Co. v. Hinomoto Tractor Sales, U.S.A.*, 703 F. 2d at 145.

The decision of the Seventh Circuit in this case completely fails to recognize this facet of foreseeability. Under the Seventh Circuit's decision, a conduit company in the stream of commerce, such as Bunnan Tong, is in an impossible position. It has no direct contacts anywhere within the United States and no control over Woolworth's distribution and marketing system. Knowing only that Woolworth is a national retailer, Bunnan Tong must attempt to anticipate and understand the laws of each state and territory where Woolworth may choose to do business, and be prepared to defend itself in every jurisdiction where Woolworth's markets may reach. For smaller companies, the only choice may be to refuse to do business with United States businesses

with large regional or national markets, or to ruiniously raise the prices of their services.

3. THE DECISION BELOW INCORRECTLY INTERPRETS AND APPLIES THE LIMITATIONS ON PERSONAL JURISDICTION IMPOSED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSITUTION.

World-Wide Volkswagen Corp. v. Woodson, supra, p.3, establishes a series of "affiliating circumstances", the presence of which are necessary for the exercise of personal jurisdiction consistent with due process:

> *. . . we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. 444 U.S. at 295.*

The opinion of the Seventh Circuit below does not apply the affiliating circumstances standards. Instead, the opinion applies a stream of commerce analysis without the affiliating circumstances limitations:

> *. . . However, even though Bunnan and United did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along the stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. . . If they were aware [of Woolworth's distribution system] they were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum within that market where their product caused injury. Appendix A, pp. 8-9, (Footnote omitted)*

Rather than reviewing Bunnan Tong's conduct for some evidence of affiliating circumstances that would indicate some purposeful effort on the part of Bunnan Tong to serve a market in Wisconsin, the Seventh Circuit has instead emphasized Bunnan Tong's delivery of the shirt to Woolworth with the knowledge that Woolworth has nationwide United States operations. Bunnan Tong's mere participation in the stream of commerce, with the knowledge that that stream of commerce ends in a national United States market, is deemed sufficient for personal jurisdiction.

Bunnan Tong did nothing to personally avail itself of the privilege of conducting business within the state of Wisconsin, and it made no effort to directly or indirectly serve a Wisconsin market. In fact, Bunnan Tong was without any actual knowledge that Woolworth's national market included Wisconsin and could not have made any effort to directly or indirectly serve the Wisconsin market had it knowr . These critical factors in determining the validity of personal jurisdiction as set forth in *World-Wide Volkswagen* were simply not considered by the court below.

Indeed, it is clear from a review of the Seventh Circuit's opinion below that the Court has failed to distinguish the test for the defendant's possible liability in tort from the standard necessary to properly invoke personal jurisdiction within the limitations imposed by the due process clause of the fourteenth amendment. Cf., *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326 at 1341 and accompanying footnote (2nd Cir. 1972). It is clear that Bunnan Tong's conduct may subject it to liabililty in tort, especially in the area of product liability. It is equally clear, however, that Bunnan Tong has not participated in delivering the shirt in question "...into the stream of commerce *with the underlying expectation that they will be purchased by consumers in [Wisconsin]."World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 298 (emphasis supplied). Bunnan Tong's conduct in this case in no way constitutes that structuring that would give Bunnan Tong some assurance that it would be liable to suit in Wisconsin. Bunnan Tong quite plainly does not have those minimum contacts or "affiliating circumstances" with Wisconsin that are the necessary predicate to any exercise of Wisconsin personal jurisdiction within the limitations imposed by the due process clause of the fourteenth amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the opinion of the Seventh Circuit.

Respectfully submitted,

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November 15, 1983

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor, by* CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*

v.

PARK INDUSTRIES, INC., *Defendant*,

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 463—John C. Shabaz, *Judge*.

ARGUED JUNE 6, 1983—DECIDED SPETEMBER 13, 1983

Before BAUER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

FLAUM, *Circuit Judge*. This appeal challenges two dismissal orders entered by the district court. In separate orders, the district court determined that it lacked personal jurisdiction over defendants Bunnan Tong & Company ("Bunnan") and United Grament Manufacturing Company ("United"). For the reasons stated below, we reverse both orders.

This diversity action is a products liability case in which the minor plaintiff seeks recovery for severe burns sustained when the cotton flannel shirt she was wearing ignited after contact with the flame from a butane cigarette lighter.[1] The amended complaint ("complaint") names the following parties as defendants: F.W. Woolworth Company ("Woolworth"), the retail seller of the flannel shirt; Travelers Insurance Company ("Travelers"), Woolworth's insurer; Bunnan, Woolworth's purchasing agent for the flannel shirt; and United, the manufacturer of the flannel shirt.[2] The complaint states four causes of action, alleging both negligence and strict liability theories against the defendants.

Bunnan moved to dismiss the complaint against it pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. In a brief order, the district court found that Bunnan has no contacts or relations with the State of Wisconsin and that there was no more than a mere likelihood that the flannel shirt supplied by Woolworth would find its way into Wisconsin. The court concluded therefore that the decision in *World-Wide Volkswagen Corp. v. Woodson ("World-Wide Volkswagen")*, 444 U.S. 286 (1980), is controlling and it granted Bunnan's motion.[3] United then made a similar motion to dismiss. In a memorandum opinion and order, the district court again found *World-wide Volkswagen* controlling and it granted United's motion to dismiss. Plaintiffs and Woolworth appeal from these two dismissal orders.

To determine whether exercising personal jurisdiction is proper, a court may receive and weigh affidavits prior to trial on the merits. *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971). During this preliminary proceeding, although the burden of proof rests on the party asserting jurisdiction, if the district court's deci

[1] In one cause of action, the minor plaintiff's parents also seek recovery for certain medical expenses incurred and for the deprivation of society and companionship of their daughter.

[2] The complaint also names "ABC Corporation," which is a fictitious name for the unknown manufacturer of the fabric used for the flannel shirt.

[3] Woolworth's and Travelers' motion to reconsider this order was denied.

sion is based on the submission of written materials the burden of proof is met by a prima facie showing that personal jurisdiction is conferred under the relevant jurisdictional statute. *Id.; see also Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1190 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980). Further, the party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record. *Id.* Applying these standards, the following facts underlie this appeal.

United and Bunnan are both foreign corporations and neither company has ever had any physical presence in the State of Wisconsin. United is incorporated under the laws of Hong Kong and it is in the business of manufacturing textile products in Hong Kong. From 1973 to 1977, United manufactured all of the 100% cotton flannel boys shirts ("flannel shirts") purchased by Woolworth for resale in the United States. There was, however, no direct commercial relationship between United and Woolworth. Rather, Woolworth retained the services of Bunnan, which is also a company incorporated under the laws of Hong Kong. Bunnan is an exporter and agent for foreign buyers of general merchandise, including textile products manufactured in Hong Kong and other Southeast Asian countries. Bunnan and Woolworth have had a business relationship since the end of World War II. This relationship has consisted of a series of buying agreements in which Bunnan agrees to act as a buying representative for Woolworth. The services Bunnan performs in that capacity include buying product samples, placing purchase contracts, inspecting products before shipment to Woolworth, acting as Woolworth's representative in efforts to obtain reimbursement from a manufacturer for defective merchandise, and holding Woolworth harmless from certain claims made against Woolworth involving the merchandise purchased by Woolworth through Bunnan.

The flannel shirt worn by the minor plaintiff in this case was manufactured by United in Hong Kong, purchased on behalf of Woolworth by Bunnan in Hong Kong, and sold at a Woolworth retail store by Woolworth in Wisconsin. The shirt was one from a purchase order placed by Woolworth with Bunnan in October 1976 for 4,300 dozen flannel shirts. Bunnan filled this purchase order with shirts manufactured by United. The shirts were packaged at United's factory with a label bearing the brand name "Topsall." Those labels were manufactured and placed on the shirts by United. Bunnan purchased the shirts

from United "F.O.B. Hong Kong." The shirts were delivered by Bunnan to a shipper in Hong Kong which had been selected by Woolworth. This shipper then arranged the transportation of the shirts from Hong Kong to New York, Boston, Philadelphia, San Francisco and Los Angeles at Woolworth's expense. Several of these shirts eventually were displayed in a Woolworth retail store in Wisconsin and one was purchased for the minor plaintiff in this case.

A federal court has personal jurisdiction over the parties in a diversity action only if a court in the state in which the federal court is sitting would have jurisdiction. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 598 (7th Cir. 1979). In addition, Fed. R. Civ. P. 4(e) requires that if no federal statute provides for the manner of service, service is governed by the law of the state in which the district court sits. The applicable statute in this case is Wisconsin's long arm statute, Wis. Stat. § 801.05 (1981-82). That section provides for personal jurisdiction over an out-of-state defendant

> *[i]n any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, providing in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.*

Wis. Stat. § 801.05(4)(b) (1981-82). There are constitutional limits, however, on the reach of this long arm statute. These limits, most recently described by the Supreme Court in *World-Wide Volkswagen*, 444 U.S. at 291-94, were relied on by the district court in dismissing United and Bunnan.

Beginning our analysis with the long arm statute, there is no question in this case that United is subject to suit under the language of that statute. United manufactured flannel shirts in Hong Kong and the one allegedly causing injury was purchased and used in Wisconsin. Bunnan, however, argues for the first time on appeal that its alleged actions in this lawsuit do not come within the purview of the long arms statute. Specifically, Bunnan submits that the complaint does not allege that Bunnan "processed, serviced or manufactured" the flannel shirt at issue here. In addition, Bunnan contends that it did nothing to prepare any of the shirts for sale. We are not persuaded by Bunnan's technical pleading argument or its narrow reading of the long arm statute. Federal Rule of

Civil Procedure 8(a)(1) requires only a short and plain statement of the grounds upon which jurisdiction depends, not a verbatim repetition of the language of the long arm statute. The complaint alleges that Bunnan is in the business of selling and/or distributing children's clothing for resale to the public and specifically that Bunnan distributed to Woolworth certain flannel shirts, one of which ultimately was purchased in Wisconsin for the minor plaintiff. These allegations are sufficient to meet the pleading requirements if the conduct described falls within the scope of the long arm statute. In this regard, the parties and court have not located any case law interpreting the phrase "processed, serviced or manufactured."[4] As a general principle though, the Wisconsin Supreme Court has determined that the long arm statute should "be given a liberal construction in favor of the exercise of jurisdiction." *Stevens v. White Motor Corp.*, 77 Wis. 2d 64, 74, 252 N.W. 2d 88, 93 (1977). Under such a liberal construction, we conclude that the word "processed" should be interpreted to include a distributor's purchase and sale of goods in the normal course of the distribution of those goods.[5] Therefore, both Bunnan and United are subject to suit under the long arm statute, unless the exercise of jurisdiction over them would be inconsistent with due process.

The due process question raised here requires an interpretation and application of the holding and certain dictum in *World-Wide Volkswagen* concerning the stream of commerce theory of personal

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[4] The Wisconsin Supreme Court has determined that the shipment from out of state of a pet dog as a gift did not constitute "products, materials or things processed, serviced or manufactured by the defendant" as set forth in Wis. Stat. 801.05(4)(b) (1981–82). *Lincoln v. Seawright*, 104 Wis. 2d 4, 310 N.W. 2d 596 (1981). The court acknowledged that the long arm statute should be liberally construed, but it also noted that the statute could not be ignored. The court's analysis, however, did not require it to examine the meaning of each word of the quoted passage and the opinion provides no guidance for us here.

[5] The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process. *See* Webster's Third New International Dictionary of the English Language (1963). We think these broader definitions include the actions of a distributor such as Bunnan, i.e., purchasing and selling goods in the ordinary course of trade in a distribution system.

jurisdiction in a products liability case. In *World-Wide Volkswagen*, the Court considered the property of an Oklahoma court's exercise of personal jurisdiction over two defendants in a products liability case. The plaintiffs in that case claimed injuries from an automobile accident that occurred in Oklahoma. They alleged that their foreign-manufactured automobile was defective and they sued the manufacturer, the importer, the regional distributor, and the retail dealer of the automobile. The regional distributor and retail dealer challenged the court's personal jurisdiction over them. Both defendants were incorporated in and had their places of business in New York, and that state was also where the plaintiffs had purchased the automobile.

The plaintiffs argued that the two defendants should be amenable to suit in Oklahoma because it was foreseeable that an automobile purchased in New York would cause injury in Oklahoma. The Court rejected these arguments, reasoning that a seller of chattels cannot be deemed to have appointed the chattel as his agent for service of process and that his amenability to suit does not travel with the chattel. The Court, however, did note that foreseeability is not irrelevant to the personal jurisdiction issue. It stated, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. In further explanation of this point the Court observed,

> *[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

World-Wide Volkswagen, 444 U.S. at 297-98.

Applying those principles to the case before it, the Court found no basis for Oklahoma jurisdiction over the regional distributor or retail dealer of the automobile. The retail dealer's sales were made in a city in New York and the regional distributor's market was limited to the states of New York, New Jersey and Connecticut. There were no contacts between those defendants and Oklahoma other than the fact that the plaintiffs had driven the automobile to that state and an injury occurred there. In addition, the court determined that whatever marginal revenues the two defendants received because the products they sold were capable of use in Oklahoma was too attenuated a contact to justify that state's exercise of personal jurisdiction over them. The Court therefore reversed the Oklahoma Supreme Court's decision upholding jurisdiction.

The *World-Wide Volkswagen* Court's recognition of a distinction among the various entities that might compose a distribution system of a product is pivotal to the decision in this case. The two defendants in *World-Wide Volkswagen* who were not amenable to Oklahoma jurisdiction were at the end of the automobile's distribution system. The scope of the foreseeble market served by those defendants and of the benefits those defendants derived from the sale of the product was narrow. In contrast, the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market. *See Hendrickson v. Reg O Co.*, 657 F.2d 9 (3d Cir. 1981); *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 1083 (1980); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); *Samuels v. BMW of North America, Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983); *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Augusta*, 553 F. Supp. 328 (E.D. Pa. 1982); *see also Froning & Deppe, Inc. v. Continental*

Illinois National Bank & Trust Co., 695 F.2d 289, 291-93 (7th Cir. 1982).[6]

In this action, United's and Bunnan's functions in the distribution of the flannel shirts place them at the start of the system. This case, thus, is distinguishable from the facts underlying the holding of *World-Wide Volkswagen* because United and Bunnan are early actors in a distribution system which places and moves the product in the stream of commerce. *World-Wide Volkswagen* is also different because the allegedly defective product here not only caused injury in the forum, but it was also purchased there. The question remains, though, whether under the distribution system used here it can be said that United's and Bunnan's conduct and their connection with Wisconsin are such that they should reasonably anticipate being haled into court there.

In opposing jurisdiction, United and Bunnan maintain that the flannel shirt at issue was sold in Wisconsin only because of Woolworth's actions rather than theirs. They point out that Woolworth sought out Bunnan in Hong Kong and that Bunnan independently contacted United. Further, United submits that it had no control over the flannel shirts once they were sold to Bunnan and that it made no efforts to distribute the shirts anywhere. However, even though Bunnan and United did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along a stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. In determining whether it is reasonable to hale Bunnan and United into court in Wisconsin, a critical fact is whether those defendants were aware of that distribution system. If they were aware, they were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum

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[6] These cases generally involve manufacturers or distributors who governed their own distribution systems and/or also engaged in activities in the forum soliciting sales of their products. Although evidence that a defendant manages its own distribution system or engages in other contacts with a forum presents a stronger case for exercising personal jurisdiction, such conduct is not a minimal requirement for jurisdiction as long as it can be said that a defendant's conduct and connection with a particular forum are such that it should reasonably anticipate being haled into court in that forum. *See World-Wide Voldkwagen*, 444 U.S. at 297-98; *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

within that market where their product caused injury.[7]

In regard to the knowledge issue, affidavits, submitted by Woolworth allege that both Bunnan's and United's personnel were aware of Woolworth's distribution of products for retail sale in the ordinary course of trade. Bunnan does not dispute this fact and it would seem likely that it is true, since Bunnan has had direct contractual relations with Woolworth for many years and employees of the two companies have visited each other's offices in Hong Kong and New York many times. United's knowledge of the flannel shirts' distribution is a closer question. The district court noted that United was possibly aware of the scheme of distribution, but it found that United had no knowledge or expectation that Wisconsin consumers would purchase its shirts. *Nelson v. F.W. Woolworth Co.*, No. 81 C 646, slip op. at 6 (W.D. Wis. Jan. 14, 1983). We find, however, that on the record established and under the standards governing at this stage of the litigation, United was more than possibly aware of Woolworth's distribution system. The Woolworth affidavits indicate that Woolworth personnel annually visited United's premises and that one of United's directors knew that the shirts manufactured under the "Topsall" label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.[8] These allegations are sufficient for a prima facie showing and we therefore must assume United had full knowledge of the distribution scheme.

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[7] The district court determined that United did not deliver its products into the stream of commerce apparently because Woolworth went to Hong Kong to import flannel shirts and then distributed and sold them in the United States. We find this analysis of the stream of commerce theory too narrow. A manufacturer places a product in a stream of commerce whether it controls the distribution of the product or not. The relevant question for due process purposes in a personal jurisdiction challenge is whether the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 298. *See also* footnote 6 *supra*.

[8] Apparently, virtually all printed flannel shirts sold in the United States enter this country through some distribution system originating in a foreign country because 85% to 90% of all those shirts are manufactured by businesses outside the United States.

Woolworth's established distribution system funneled thousands of flannel shirts into its retail stores throughout the United States. For many years Bunnan acted as Woolworth's buying agent for those flannel shirts and for several years United manufactured them. The normal course of the distribution system brought several shirts to a retail store in Wisconsin and one was purchased for the minor plaintiff in this case. Bunnan and United were aware of the Woolworth distribution scheme and derived economic benefit from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that Bunnan and United were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt and allegedly caused injury. Therefore, we reverse the two orders dismissing United and Bunnan from this action for lack of personal jurisdiction.

It is so ordered.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX A

Opinion by Judge Flaum

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

SEPTEMBER 13, 1983.

HON. WILLIAM J. BAUER, Circuit Judge,
HON. JOEL M. FLAUM, Circuit Judge,
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs-Appellees*,

v.

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 463—John C. Shabaz, *Judge*.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

In the
UNITED STATES DISTRICT COURT
for the Western District of Wisconsin

TELINA NELSON, *a minor*, by Cindra R. Carson,
Guardian ad Litem, GERALD NELSON, and
SHERRY NELSON, *Plaintiffs*,

v.

F.W. WOOLWORTH COMPANY, a foreign corporation,
TRAVELERS INSURANCE COMPANY, a foreign corporation,
PARK INDUSTRIES, INC., a foreign corporation,
BUNNAN TONG AND COMPANY, LTD., a foreign corporation,
UNITED GARMENT MANUFACTURING COMPANY, LTD.,
a foreign corporation, and
ABC CORPORATION, *Defendants*.

Motion to dismiss by defendant Bunnan Tong and Company, Ltd. having been scheduled for hearing before the Court on September 15, 1982, the Hon. John C. Shabaz, District Judge, presiding, the plaintiffs having appeared by Guelzow, Aubry, Senteney & Carson, by George H. Senteney; the defendants F.W. Woolworth and Travelers Insurance Company having appeared by Riordan, Crivello, Carlson, Mentkowski & Henderson, by Frank T. Crivello; the defendant Park Industries, Inc. by Carroll, Parroni, Postlewaite, Anderson & Graham, by Arnold P. Anderson; and the defendant Bunnan Tong and Company, Ltd., by Bell, Metzner & Hierhart, by John M. Moore and Barrett J. Corneille,

And the Court being of the opinion that the decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, is controlling, and this Court being of the opinion that the defendant Bunnan Tong and Company, Ltd. has no contacts, ties or relations whatsoever with the State of Wisconsin, and that there is no more than a mere likelihood that the product supplied by the defendant Bunnan Tong to the defendant F.W. Woolworth will find its way into the state of Wisconsin,

Now, therefore,

ORDER

IT IS ORDERED that the motion of the defendant Bunnan Tong and Company, Ltd. to dismiss is GRANTED.

Entered this 16th day of September, 1982.

BY THE COURT:

JOHN C. SHABAZ
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
OCTOBER 28, 1983.
BEFORE

HON. WILLIAM J. BAUER, Circuit Judge,
HON. JOEL M. FLAUM, Circuit Judge,
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARLSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*

v.

PARK INDUSTRIES, INC., *Defendant*, *F. W. WOOLWORTH COMPANY* and TRAVELERS INSURANCE COMPANY,
Defendants-Appellants,

and

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 643—John C. Shabaz, *Judge*.

On September 27, 1983, defendant-appelles filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.